STATE OF MICHIGAN

COURT OF APPEALS

TACCO FALCON POINT, INC.,

Plaintiff/Counter-Defendant-Appellee,

v

DAVID M. CLAPPER,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellant/Cross-Appellee,

v

ART MIDWEST, INC.,

Intervening Third-Party Defendant-Appellee/Cross-Appellant,

and

AMERICAN REALTY INVESTORS, INC.,

Third-Party Defendant-Appellee,

and

AMERICAN REALTY TRUST, INC.,

Third-Party Defendant-Appellee/Cross-Appellant,

and

ART MIDWEST, L.P.,

Third-Party Defendant.

UNPUBLISHED
February 1, 2007

No. 271525
Oakland Circuit Court
LC No. 2002-042917-CZ

DAVID M. CLAPPER,

Plaintiff-Appellant,

v

TACCO FALCON POINT, INC.,

Defendant-Appellee.

No. 271552
Oakland Circuit Court
LC No. 2005-066850-CZ

Before: Meter, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant David Clapper (Clapper) appeals as of right from the circuit court's order granting summary disposition to plaintiff TacCo Falcon Point, Inc. (TacCo). The court concluded that Clapper was liable to TacCo under a consent judgment signed in Indiana. Clapper takes exception to this ruling and also to a ruling by the court that dismissed third-party defendant American Realty Investors (ARI) from the case. Third-party defendant American Realty Trust, Inc. (ART) cross-appeals, arguing that the court erred in rejecting ART's argument that Clapper's third-party contribution claim against ART was invalid and that ART was therefore entitled to summary disposition. Intervening third-party defendant Art Midwest, Inc (ARTM), a court-appointed liquidator of defendant Art Midwest, L.P. (ARTMLP) (one of the entities sued by Clapper for contribution), also cross-appeals, arguing that the circuit court should have granted summary disposition to ARTM with respect to Clapper's claims against ARTMLP, because ARTMLP has been dissolved. We affirm in all respects except with regard to the claims involving (1) the dissolution of ARTMLP and (2) the liability of ARI.

ART and a related entity, along with Clapper and his related entity, defaulted on a loan owed to Inland Mortgage Company (Inland). The loan had been made in connection with the purchase of an apartment complex in Indiana. After litigation in Indiana, ART and Inland reached a settlement whereby Inland agreed to reduce its claim from nearly $3,400,000 in exchange for entry of a judgment for $3,200,000. The judgment provided that ART and Clapper were jointly and severally liable for the $3,200,000. Clapper's attorney signed the consent judgment.

Inland later assigned the judgment to TacCo in exchange for a payment of $3,000,000. $1,500,000 was paid up front, and TacCo signed a note for the remaining $1,500,0000. Inland retained a security interest in the judgment. The assignment agreement required that TacCo make a minimum creditor's bid of $1,000,000 at the Sheriff's sale of the apartment complex. TacCo did so, and, because it was the only bidder, it acquired the property. The amount due under the judgment was therefore reduced to $2,200,000. TacCo then filed the instant Michigan action to enforce the judgment against Clapper, who resides in Michigan.

Clapper and TacCo filed motions for summary disposition. Clapper argued, in part, that ART had actually incorporated TacCo and that the entities should be considered one and the same for purposes of enforcing the judgment. Clapper argued that, in accordance with the "strawman" defense available under Indiana law, the judgment must be deemed *satisfied* (and therefore extinguished as applied to Clapper) because Inland, in assigning the judgment to TacCo, had in actuality assigned the judgment to one of the debtors, ART. Clapper argued, in essence, that ART had used a strawman, TacCo, in order to keep the judgment alive as applied to Clapper. The circuit court rejected Clapper's arguments, stating that the law of Michigan applied to the instant action and that the strawman defense is not available in Michigan. The court, after addressing additional defenses raised by Clapper, granted TacCo's motion for summary disposition, which TacCo had brought under MCR 2.116(C)(10).

On appeal, Clapper first argues that the court erred in rejecting the strawman defense, and, accordingly, in granting summary disposition to TacCo.

We review do novo a trial court's grant or denial of summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

> A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ.

The moving party has the initial burden of supporting its position that there is no genuine issue of material fact by pointing to affidavits, depositions, admissions, or other documentary evidence in the record. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the nonmoving party to show that a genuine issue of material fact does exist. *Id*.

Clapper contends that Indiana law, and particularly the strawman defense available under Indiana law, should apply to the present action. We disagree. In MCL 691.1171, Michigan adopted the Uniform Enforcement of Foreign Judgments Act, which provides as follows in MCL 691.1173:

> A copy of a foreign judgment . . . may be filed in the office of the clerk of the circuit court, the district court, or a municipal court of this state. The clerk shall treat the foreign judgment in the same manner as a judgment of the circuit court, the district court, or a municipal court of this state. *A judgment filed under this act has the same effect* and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying *as a judgment of the circuit court*, the district court, or a municipal court *of this state* and may be enforced or satisfied in like manner. [Emphasis added.]

Furthermore, in *Baker v General Motors, Corp*, 522 US 222, 235; 118 S Ct 657; 139 L Ed 2d 580 (1998), the U.S. Supreme Court held that

> [f]ull faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law.

Similarly, the Restatement (Second) of Conflict of Laws § 99 (1969) provides that "[t]he local law of the forum determines the methods by which a judgment of another state is enforced."

Under the above authorities, the circuit court correctly concluded that Michigan law, not Indiana law, controls with regard to the present action. Clapper argues that the above authorities are not dispositive because his primary argument is not concerned with TacCo's manner of enforcing the judgment but instead concerns whether the judgment has been satisfied (and therefore extinguished as applied to Clapper). Clapper's argument elevates form over substance. Clearly, TacCo is seeking to enforce the judgment against Clapper, and Clapper is resisting that enforcement by raising various arguments, including the strawman argument. These various issues, dealing with the enforcement of the judgment, are governed by Michigan law. *Baker*, *supra* at 235. To further support his claim, Clapper cites the Restatement (Second) of Conflict of Laws § 115 (1971), which states that "[a] judgment will not be recognized or enforced in other states if upon the facts shown to the court equitable relief could be obtained against the judgment in the state of rendition." However, Clapper has cited no basis for obtaining equitable relief against the judgment, which was a validly signed and entered consent judgment. Instead, Clapper is merely trying to avoid enforcement of the judgment based on actions that occurred after the valid entry of the judgment. Clapper also cites the Restatement (Second) of Conflict of Laws § 116 (1971), which states that "[a] judgment will not be enforced in other states if the judgment has been discharged by payment or otherwise under the local law of the state of rendition." Here, the judgment has *not* been discharged and there is certainly no satisfaction of judgment found in the record. Indeed, the consent judgment, under which Clapper is liable, remains in effect, and TacCo is seeking to enforce it. Clapper also cites the case of *Ward v Hunter Machinery Co*, 263 Mich 445, 456; 248 864 (1933), in which the Court stated that

> [t]he judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced, and . . . whatever pleas would be good to a suit thereon in such state, and none others, [can] be pleaded in any other court in the United States. [Citation and quotation marks omitted.]

Again, however, the consent judgment is not being challenged here. Instead, Clapper is trying to avoid enforcement of the judgment. We apply Michigan law to these enforcement proceedings. *Baker*, *supra* at 235.

Clapper argues that, even if Indiana law does not apply here, the circuit court nonetheless erred in granting summary disposition to TacCo because the strawman defense is in fact recognized in Michigan. We disagree. Clapper has not cited any binding or persuasive authority indicating that the strawman defense, whether referred to as such or referred to by another name, is recognized in Michigan. Clapper additionally argues that we must deem the judgment satisfied in this case because to do otherwise would be contrary to public policy. Clapper states in his appellate brief:

> It would be inherently unfair and unjust, thus against public policy, to allow a co-judgment debtor to satisfy a judgment[] (like ART did with Inland), and then arrange for the assignment of the judgment to an entity later created and then controlled by the co-judgment debtor, for purposes of enforcing the entire judgment only against other co-judgment debtors, i.e. Clapper.

Clapper's argument is unavailing. Indeed, Clapper *consented* to the entry of the judgment, and nothing precludes him from seeking contribution against ART. In fact, as stated elsewhere in this opinion, the circuit court granted Clapper's motion for summary disposition against ART with regard to Clapper's contribution claim.[1] Nothing unfair or unjust occurred here. Nor do we find merit to Clapper's argument that failing to deem the judgment satisfied here would set a precedent for judgment creditors to "forum shop." This is not a persuasive argument because a creditor would not be able simply to choose a forum that had no connection to the pertinent parties.

Clapper additionally argues that the intent of Inland and TacCo was to deem the judgment satisfied after the assignment of the judgment to TacCo. This was clearly not the case, given that Inland retained a security interest in the judgment. Clapper also suggests that the assignment of the judgment to TacCo resulted in a reduction of the judgment because a principal of Inland admitted that "[i]f the judgment ever comes back into [Inland's] hands . . . ART gets credit for the one million five . . . because they [ART] paid it." This suggestion is nothing more than a partial reiteration of the strawman defense discussed earlier. In other words, Clapper is arguing that the judgment was satisfied, in part, because it was ART that made the payment to Inland. We have already rejected the strawman argument and will not reiterate our holding here. Inland assigned to TacCo the right to collect on the full judgment, in exchange for consideration paid by TacCo. TacCo now has the right to collect on the full judgment.

As an alternative basis for reducing the amount of the judgment, Clapper argued in the circuit court that the price paid by TacCo for the apartment complex at the Sheriff's sale was inadequate, that the sale was essentially equivalent to a fraudulent conveyance, and that the inadequate price resulted in the judgment against Clapper being higher than it should have been. Clapper indicated, among other things, that the property had been appraised at $1.95 million a few months after the sale. The circuit court rejected Clapper's arguments, stating, with regard to the appraisal, that the evidence demonstrated that a property might actually sell at twenty-five percent less than the appraisal price. The court also stated that "the fact that a better price could have been obtained is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner."

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[1] The dissent suggests that ART, "being the alleged alter ego of TacCo, essentially pays nothing for the property . . . ." This is not an accurate characterization. Assuming, for purposes of argument, that ART was TacCo's alter ego, then TacCo/ART paid $1,000,000 at the Sheriff's sale *and* is subject to Clapper's 50% contribution claim (amounting to approximately $1,100,000). As noted, the trial court granted summary disposition to Clapper with regard to the contribution claim, and we are affirming that decision on appeal.

Clapper now reiterates his arguments on appeal, and we find no error requiring reversal. Alleged price inadequacy is not a valid reason to vitiate a foreclosure sale, if the proceedings were fair and regular. *Chabut v Chabut*, 66 Mich App 440, 448; 239 NW2d 401 (1976). Clapper has produced insufficient evidence that any procedural impropriety occurred with respect to the Sheriff's sale.[2]

Under all the circumstances, the circuit court did not err in granting TacCo's motion for summary disposition.[3]

Clapper next argues that the circuit court erred in dismissing his contribution claim against ARI. The court granted summary disposition to Clapper with respect to his contribution claim against ART but dismissed his claim against ARI. The court stated: "Although Defendant states numerous times in its pleadings and argument that ARI is the successor of ART, he provides no evidentiary support for that allegation and, thus, there is no basis for contribution as to ARI."

Clapper moved for summary disposition under MCR 2.119(C)(9) and (C)(10). This court's obligations when reviewing a summary disposition motion brought under MCR 2.116(C)(10) are discussed above. "Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim." *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000). In reviewing a motion brought under MCR 2.116(C)(9), we accept "all well-pleaded allegations as true" and will grant the plaintiff's motion if the defenses are untenable as a matter of law. *Id*. We note, however, that the circuit court did not merely deny Clapper's motion for summary disposition with regard to the contribution claim against ARI. Instead, it went a step further and dismissed the claim against ARI, even though ARI had not itself moved for summary disposition on the basis of its not being, in actuality, the successor to ART. Evidently, the court's ruling was based on MCR 2.116(I)(2), which states: "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment without delay."

ARI argues that the circuit court correctly dismissed the case against it because Clapper presented insufficient documentary evidence to prove that ARI was ART's successor. However, Clapper *did* produce documentary evidence to this effect, including a Securities and Exchange Commission report that states that ARI "is the successor through merger" to ART. ARI argues that this Court should not consider the documentary evidence because it was submitted with a reply brief and not with Clapper's original motion for summary disposition. The fact that Clapper did not attach documentary evidence to his original motion for summary disposition was sufficient for the circuit court to have denied Clapper's motion regarding ARI. However, as

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[2] We also note that the appraised price was not dispositive, given that the appraisal witness did indeed indicate that the price obtained at a foreclosure sale could be more than twenty-five percent less than the appraised price.

[3] Accordingly, the circuit court also did not err in denying Clapper's motion for summary disposition.

noted above, the court not only denied Clapper's motion but also *granted* summary disposition to ARI, despite the fact that ARI did not move for summary disposition on the basis in question. This dismissal of ARI was erroneous, given that, at the very least, Clapper raised a genuine issue of material fact regarding whether ARI was the successor to ART.[4]

In its cross-appeal, ART contends that the circuit court erred in denying its motion for summary disposition with regard to Clapper's contribution claim.[5] ART moved for summary disposition under MCR 2.116(C)(6) and (C)(8). MCR 2.116(C)(8) allows for summary disposition if "[t]he opposing party has failed to state a claim on which relief can be granted." In reviewing a motion brought under this subrule, "we assume that all factual allegations in the nonmoving party's pleadings are true and determine if there is a legally sufficient basis for the claim." *Salinas v Genesys Health System*, 263 Mich App 315; 688 NW2d 112 (2004). MCR 2.116(C)(6) allows for summary disposition if "[a]nother action has been initiated between the same parties involving the same claim." In reviewing a motion brought under MCR 2.116(C)(6), we consider the "[a]ffidavits, depositions, admissions, and documentary evidence offered," MCR 2.116(G)(5), and determine whether the two suits were "based on the same or substantially same cause of action." *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660; 341 NW2d 783 (1983).

ART first contends that Clapper was not permitted to sue ART, a joint obligor, until Clapper had paid more than his share of the joint obligation. See *Kalamazoo Trust Co v Merrill*, 159 Mich 649, 655; 124 NW 597 (1910) ("[o]ne joint obligor may not sue another joint obligor, upon their common obligation, until he has paid the debt, or a larger portion thereof than, as between himself and his co-obligor, he would be liable to pay"), and *Kelly v Sproul*, 153 Mich 691, 692-693; 117 NW 327 (1908) ("the right of action for contribution does not accrue until payment is made"). See also *Sziber v Stout*, 419 Mich 514, 534; 358 NW2d 330 (1984). ART contends that Clapper had *not* in fact paid more than his share of the joint obligation and therefore could not proceed against ART. The circuit court, in ruling on this issue, perfunctorily stated that Clapper need not have paid more than his share of the obligation before suing ART.

We conclude that no error requiring reversal occurred. First, Clapper did not file a separate lawsuit against ART but instead filed a third-party complaint. This was explicitly authorized under MCR 2.204(A)(1), which states, in pertinent part: "[A]ny time after commencement of an action, a defending party, as a third-party plaintiff, may serve a summons and complaint on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim." Second, plaintiff deposited the amount of TacCo's judgment with the circuit court. Clapper admits in his appellate brief that "[i]f Clapper is unsuccessful on his appeal as to the TacCo issues, then TacCo will be entitled to the entire

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[4] ARI, as alternative bases for us to affirm the dismissal of the third-party claim against it, raises arguments similar to those raised by ART and discussed later in this opinion. We reject ARI's arguments for the same reasons that we reject the similar arguments raised by ART.

[5] Although this fact is not emphasized by ART on appeal, we reiterate that the circuit court, in addition to denying ART's motion for summary disposition, *granted* Clapper's motion for summary disposition with respect to the contribution claim against ART.

$2.5 million." The circuit court was mindful of Clapper's possible payment to TacCo and explicitly stated, in its order, as follows:

> [J]udgment is hereby entered in the amount of 50% (fifty percent) of the amount paid by Third-Party Plaintiff to Plaintiff, provided that execution of this judgment is precluded until payment by Defendant/Third-Party Plaintiff of an amount in excess of 50% of Plaintiff's judgment against Defendant/Third-Party Plaintiff, in which even Defendant/Third-Party Plaintiff may have execution of this Judgment against Third-Party Defendant ART for the excess.

Therefore, the court indicated that Clapper would not, in actuality, be able to successfully execute his claim against ART until *after* Clapper paid TacCo. Under the circumstances, we find no viable basis on which to reverse the circuit court's ruling.

ART argues that MCR 2.204(A)(1) was not applicable here because the instant action was nothing more than an action to domesticate a judgment, "i.e., to determine whether the Indiana court had jurisdiction over Clapper such that its determination with respect to Clapper should be recognized against Clapper in Michigan." ART states that because this action was merely an action to domesticate a judgment, there was no possible way that ART could be liable to Clapper for TacCo's claim. The circuit court rejected this argument, stating that the case involved the *enforcement* of a judgment and that Clapper's contribution claim could proceed. We again find no basis for reversal. TacCo filed a complaint to enforce the judgment, and the resultant lengthy litigation has revolved around whether Clapper should be responsible for paying the amount owed under the judgment. Clearly, Clapper's liability for paying the judgment has been a central issue in the case, and, as noted above, Clapper has deposited the amount of TacCo's judgment with the circuit court. Because Clapper's liability for paying the judgment has been at issue, ART's liability for contribution has also been at issue. Reversal is unwarranted.

ART next argues that the circuit court should have granted its motion for summary disposition under MCR 2.116(C)(6) because a substantially identical claim had been filed by Clapper against ART in a federal court in Texas. However, the Texas lawsuit sought indemnification and was based on an indemnification agreement. "Contribution and indemnification are separate and distinct claims." *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 248; 533 NW2d 15 (1995). In the present case, Clapper is seeking not indemnification but contribution, asserting that he is entitled to contribution from ART by virtue of the fact that ART is a co-judgment debtor. See *Caldwell v Fox*, 394 Mich 401, 417 231 NW2d 46 (1975). Given these circumstances, summary disposition under MCR 2.116(C)(6) was not warranted.

Next, ARTM argues that the circuit court, in reviewing Clapper's motion for summary disposition against ART and ARTMLP with regard to the contribution claim, should have granted summary disposition to ARTMLP under MCR 2.116(I)(2) because ARTMLP had been dissolved. As noted earlier, MCR 2.116(I)(2) states: "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment without delay."

In June 2003, a United States District Court in Texas entered a final judgment that dissolved ARTMLP, appointed ARTM and ARI as a co-liquidators to wind up and liquidate the

partnership, and ordered them to submit appropriate documentation for the windup. The Texas District Court approved the windup plan on January 7, 2004, and on July 14, 2004, ARTM filed a Certificate of Cancellation of Domestic Limited Partnership with the Texas Secretary of State.

On June 13, 2006, in ruling on ARTM's argument below, the circuit court correctly noted that Clapper's third-party complaint against ARTMLP was filed "after dissolution began but before the certification of cancellation was filed." The court concluded that, under Texas law, a partnership can "defend a civil . . . action" during the "winding up process." The court stated: "Thus, because this case was filed in 2002 before the certificate of cancellation was filed in July 2004, the defendant may proceed against [ARTMLP]." However, as noted above, the Texas court approved the windup plan for ARTMLP on July 14, 2004. In that windup plan, ARTM and ARI stated the following:

> Because no assets are left in the Partnership, no further action is required to wind up the Partnership other than for this Court to approve the winding up . . . and, after the Court enters such order, for a certificate of cancellation of domestic limited partnership to be filed with the State of Texas.

As also noted above, ARTM filed the certificate of cancellation on July 14, 2004. Under these circumstances, it is clear that ARTMLP had been *cancelled* at the time of the circuit court's ruling in this case. Accordingly, the circuit court erred in failing to grant summary disposition to ARTM with regard to the contribution claim against ARTMLP. Clapper argues that a partnership may still be sued during the dissolution process and that part of the windup procedure necessarily involves the resolution of outstanding court cases. However, that argument was pertinent *to the Texas action governing the dissolution of the partnership*.[6] On the record before us, we have no choice but to conclude that the partnership was cancelled as of July 14, 2004, and that the circuit court therefore should have dismissed Clapper's contribution claim against ARTMLP.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Alton T. Davis

[6] Clapper had notice of and participated in the Texas proceedings.